No. 92-540

FILED
SEP 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LABOR UNION OF PICO KOREA, LTD.; JUM-SOON YOO, President of Labor Union of Pico Korea, Ltd.; and SUNG RYE HONG, General Secretary of Labor Union of Pico Korea, Ltd.,

Petitioners,

- vs -

PICO PRODUCTS, INC. and BERNARD HITCHCOCK, individually and in his capacity as Chairman of the Board of Directors, Director, and Chief Executive Officer of Pico Products, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MENTER, RUDIN & TRIVELPIECE, P.C.
*WILLIAM F. BAKER
GERALD J. MATHEWS
Attorney for Respondents
500 South Salina Street, Suite 500
Syracuse, New York 13202
(315) 474-7541

* *Counsel of Record*

BEST AVAILABLE COPY

SYRACUSE APPELLATE PRINTING CO., 215 E. Water St., Syracuse, NY 13202
(315) 475-7041 • in CNY (800) 479-7041

QUESTION PRESENTED

In enacting the Labor Management Relations Act, did Congress intend Section 301 of the Act to provide subject matter jurisdiction in an action for a breach of a labor contract executed between foreign citizens and a foreign corporation?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 10

APPENDIX . . . . . A.1 - A.39

TABLE OF AUTHORITIES

Statutes

Labor Management Relations (Taft-Hartley) Act
Section 301(a), 29 U.S.C. § 185(a) (1978) . . passim

Civil Rights Act of 1964, 42 U.S.C. § 2000e(f)
(1981 & Supp, 1992) 9

Cases

Arizona v. Rumsey,
467 U.S. 203 (1984) 10

Benz v. Compania Haviera Hidalgo,
353 U.S. 138 (1957) 3, 4, 6, 8, 10

EEOC v. Arabian-American Oil Co.,
___ U.S. ___, 111 S. Ct. 1227 (1991) 5, 8, 9

Foley Bros. v. Filardo,
336 U.S. 281 (1949) 5

Hilton v. South Carolina Pub. Ry. Comm'n,
___ U.S. ___, 112 S. Ct. 560 (1991) 8, 9, 10

International Longshoremen's Ass'n, Local 1446 v. Ariadne Shipping Co., 397 U.S. 195 (1970) . . . 8

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 8

Paterson v. McLean Credit Union,
491 U.S. 164 (1989) 9

Wooddell v. International Bhd. of Elec. Workers,
___ U.S. ___, 112 S. Ct. 494 (1991) 4

STATEMENT OF THE CASE

The Petitioners' Statement of the Case, although substantially correct, omits certain facts the Respondent believes are relevant to the issues presented herein. These facts are as follows.

At the time of the events alleged in the Complaint in this action, the Respondent Pico Products, Inc. ("Pico Products") was a New York corporation with its principal place of business in Liverpool, New York. (A.2, A.12)[1] Pico Macom, Inc. ("Pico Macom") was and is a Delaware corporation with its principal place of business in Lake View Terrace, California and a wholly-owned subsidiary of Pico Products. *(Id.)* Pico Korea, Ltd. ("Pico Korea") was a South Korean corporation with its principal place of business in Seoul, South Korea and a wholly-owned subsidiary of Pico Macom. *(Id.)* The Petitioners are citizens and domiciliaries of South Korea and are former employees of Pico Korea. (A.3)

Pico Korea, initially incorporated in 1985 to manufacture electronic components for the cable TV industry, was a marginally profitable business in its first two years of operations. (A.3, A.13) In April 1988, however, Pico Korea, by now experiencing operating losses, began to run short of operating capital. (A.3-4, A.13) Pico Macom, without the knowledge or consent of Pico Products, (A.26) initiated a deficit funding program whereby each month Pico Macom would advance to Pico Korea additional working capital to

[1] All citations to "A" refer to the Appendix contained in this brief.

assist Pico Korea in meeting its monthly obligations. (A.3, A.13)

In June of 1988, the workers at Pico Korea began the process of forming a labor union. *(Id.)* On November 15, 1988, a Collective Bargaining Agreement ("CBA") was entered into by the Petitioner Union and Pico Korea. *(Id.)*

By late January and early February of 1989, the financial drain of providing working capital to Pico Korea was endangering the entire Pico conglomerate. (A.33) On February 23, 1989, a meeting of the Board of Directors of Pico Products was held to specifically discuss the financial problems of Pico Korea and the resulting effects on Pico Macom and Pico Products. (A.4, A.18) As a result of the meeting, the Board of Directors of Pico Products directed Pico Macom to immediately cease providing additional working capital to Pico Korea. *(Id.)*

Although there was never an official decision to "close" Pico Korea, the decision by the Board of Directors of Pico Products to stop the supply of additional working capital to Pico Korea had the same effect. Absent the continuous supply of cash from Pico Macom, Pico Korea was not able to meet its obligations, ceased to do business as a going concern, and was financially unable to meet the contested terms of the CBA. (A.34)

SUMMARY OF ARGUMENT

This Court should deny the Petitioners' Petition for a Writ of Certiorari, as the issues involved in this

proceeding do not present a substantial federal question.

The Petitioners assert that the "plain language" of Section 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 185) provides subject matter jurisdiction in a breach of a labor contract action by foreign citizens working abroad who are employed by a foreign employer. The Petitioners' arguments fail to reflect the presumption against extraterritorial application of Statutes enacted by Congress.

Congress is presumed to be concerned with domestic concerns first. Thus, Statutes enacted by Congress apply only in the United States and its territories, absent an express Congressional intent to the contrary. The Petitioners have failed to carry their burden of demonstrating an express Congressional intent to overcome the presumption against the extraterritorial application of Section 301.

Further, as long ago as 1957, this Court ruled that the LMRA does not apply to foreign workers. *See Benz v. Compania Haviera Hidalgo,* 353 U.S. 138 (1957). Since the *Benz* decision, Congress has been free to alter this Court's interpretation of the territorial coverage of the LMRA. Congress has not chosen to do so. Based upon this Court's adherence to the doctorine of *stare decisis,* the Petitioner's request for reconsideration of the statutory construction of the LMRA should be denied.

ARGUMENT

The Petitoners have failed to demonstrate a basis for this Court to invoke its discretion and grant a Writ

of Certiorari because no basis exists. Both lower courts correctly followed this court's previous decision in *Benz* that held that the LMRA does not apply to foreign workers. *See Benz*, 353 U.S. 138. The Petitioners now seeks little more than an overruling of *Benz*.

The Petitioners' primary argument to this Court is that both lower courts erred in focusing their attention on the nature of the labor contract at issue. According to the Petitioners, the lower courts should have focused their attention on the nature of the "suit" because "Section 301... does not give jurisdiction over particular *contracts* -- it provides jurisdiction over *suits*. (Petition for Writ of Certiorari at 6) The Petitioners' argument fails to consider that it is the existence of a labor contract and *not* the status of the parties to the action that bestows subject matter jurisdiction pursuant to Section 301. *Cf., Wooddell v. International Bhd. of Elec. Workers*, ___ U.S. ___, 112 S. Ct. 494 (1991) (holding that subject matter jurisdiction exists pursuant to Section 301 in an action based upon the breach of a labor union's constitution and not an employer/employee dispute).

In both courts below the Petitioners argued that because the plain language of Section 301 provides for subject matter jurisdiction "without regards to the citizenship of the parties," the Petitioners' status as foreign workers should not be considered. This argument is inapposite. As stated by the Court of Appeals: "the issue is not plaintiffs' citizenship, but rather whether the labor agreement at issue is of a type Congress planned on having Section 301 control." (A.6)

Thus, both lower courts correctly focused on the labor contract at issue in this action in order to determine "whether Congress planned that the labor contract . . . [of this type] was to be covered by Section 301." (A.6) That Congress never intended labor contracts between citizens and domiciliaries of a foreign country and their foreign employer[2] to be covered by Section 301, cannot be disputed. "Legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). This cannon of construction provides the correct approach to determine Congressional intent when necessary to construe a Statute, and serves to protect against unintended clashes between the laws of the United States and the laws of other nations which could result in international discord. *See EEOC v. Arabian-American Oil Co.*, ___ U.S. ___, 111 S. Ct. 1227 (1991).

In construing the LMRA, the courts below correctly looked to the language in the LMRA to ascertain whether Congress has indicated a legislative purpose to extend the LMRA's coverage beyond places over which the United States has sovereignty or some measure of legislative control. *See Foley Bros.*,336 U.S. at 285. Finding none, the courts below

---

[2]The Court of Appeals below stated: "The fact that Pico Korea is a wholly-owned subsidiary of a United States Corporation does not change the character of this labor dispute into one over which Congress can be presumed to have inteded Section 301 to control." (A.8)

correctly ruled that subject matter jurisdiction pursuant to Section 301 had not been established.

As stated by this Court: "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of Congress clearly expressed, we must presume it is primarily concerned with domestic conditions." *Arabian-American*, 111 S. Ct. at 1240.

In *Benz*, this Court was afforded the opportunity to examine the territorial limitations of the LMRA. Upon examining the legislative history of the LMRA, this Court found no indication that the LMRA was intended to govern disputes between foreign employees and their foreign employers.

Specifically, this Court stated:

> The whole background of the Act [LMRA] is concerned with industrial strikes between American employers and employees. In fact, no discussion in either House of Congress had been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to ... [foreign workers]. It appears not to have even occurred to those sponsoring the Bill. The report made to the House by the co-author of the Bill, Chairman Hartley, stated that 'the Bill herein reported has been formulated as a bill of rights both for

> American workingmen and for their employer.' The report dictates further that because of the inadequacies of legislation, the *American* workingman has been deprived of his dignity as an individual and that it is the purpose of the Bill to correct these inadequacies. **What was said inescapably describes the boundaries of the Act as including only working men of our own Country and its possessions.**

Benz, 353 U.S. at 143 - 44 (bold face added, internal citations omitted).

Here, the Petitioners argue that although their position cannot be supported by the legislative history of the LMRA, the language of Section 301 alone should suffice to persuade this Court that Section 301 provides subject matter jurisdiction for foreign workers.

However, the Petitioners: "carry the burden of demonstrating a congressional purpose to overcome the presumption against extraterritorial application." (A.6) Without a showing of Congress's clearly expressed affirmative aim that Section 301 provides subject matter jurisdiction to foreign workers, Petitioners have failed to meet this burden.

Implicit in the Petitioners' argument is that this Court should disregard its prior rulings that foreign workers are not covered by the LMRA. *See Benz*, 353 U.S. 138 (holding that the LMRA did not govern a dispute stemming from the picketing of a foreign ship

operated entirely by foreign seamen under foreign articles while the vessel was temporarily in an American port); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (National Labor Relation Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"), does not govern competing unions' claims to represent alien crews of ships owned by foreign subsidiaries of United States corporation that make regular trips between American and foreign ports transporting parent's products); *cf., International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970) (NLRA applies to a dispute involving *American* workers protesting wages paid by foreign vessels owners to *American* workers while the vessels are in *American* ports)

Further, the Petitioners are requesting this Court to overrule the interpretation of the LMRA first enunciated in *Benz* 35 years ago, that when Congress first enacted the LMRA, it was formulated as a bill of rights both for *American* workingmen and for their employer. *See Benz*, 353 U.S. at 143-44. In other words, the Petitioners are requesting a reconsideration of the long standing statutory construction this Court has constantly applied. *See Arabian-American*, 111 S. Ct. 1227.

The Petitioners request for reconsideration of the statutory construction of the LMRA should be denied based upon this Court's long standing adherence to the doctrine of *stare decisis*. *See Hilton v. South Carolina Pub. Ry. Comm'n*, ___ *U.S.* ___, 112 S. Ct. 560, 563 (1991). As this Court has recently announced:

> Considerations of *stare decisis* have

> special force in the area of statutory interpretation, for here, unlike the context of constitutional interpretation, the legislative power is implicit, and Congress remains free to alter what we have done.

Hilton, 112 S. Ct. at 563 *quoting Paterson v. McLean Credit Union,* 491 U.S. 164, 172 (1989).

Recently, this Court reiterated the logic behind the "special force" of the doctrine of *stare decisis* in statutory construction. In *Arabian-American,* this Court held that Title VII of the Civil Rights Act of 1964, (78 Stat. 243, as amended, 42 U.S.C. §§ 2000a - 2000h-6) ("Title VII") does not apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad. *See Arabian-American*, 111 S. Ct. at 1236. In an examination of the Legislative history of Title VII, this Court was unable to find a clearly expressed affirmative intention of Congress that Title VII was to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control. In concluding the majority opinion, Chief Justice Renhquist wrote: "Congress, should it wish to do so, may ... amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." *Arabian-American*, 111 S. Ct. at 1236.

Barely six months following this Court's decision in *Arabian-American,* Congress accepted this Court's invitation. By enactment of Pub. L. No. 102-166, Title I, §§ 104, 109(a), 105 Stat. 1074, 1077, Congress amended the definition of the term Employee in Title VII to include: "With respect to employment in a

foreign country, [the term Employee] includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f).

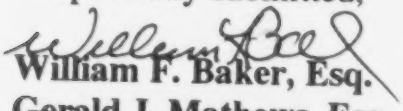
For the past 35 years, Congress has not sought to overrule or supersede this Court's holding in *Benz* and there exists no reason for this Court to do so in this case. *See Hilton,* 112 S. Ct. at 654; *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)("any departure from the doctrine of *stare decisis* demands special justification").

The Petitioners have also suggested that if the Second Circuit's ruling in this action is allowed to stand, it will have "serious ramifications on U.S. businesses which operate in the international economy and in the commerce of the United States." Whether this prophecy is true is irrelevant. Since the decision of this Court in *Benz,* "Congress has remained free to alter what this Court has done and has not done so." *Hilton,* 112 S. Ct. at 564.

CONCLUSION

For all of the reasons set forth above, this Court should deny the Petitioners' Petition for a Writ of Certiorari. The Petitioners' request "should be directed to Congress rather than the courts." *Benz,* 353 U.S. at 147.

Respectfully submitted,



William F. Baker, Esq.
Gerald J. Mathews, Esq.
MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Respondents
Office and Post Office Address
The 500 Building, Suite 500
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 474-7541

Dated: October 20, 1992

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1628, 1785—August Term 1991

(Argued June 8, 1992 Decided June 24, 1992)

Docket Nos. 92-7143, 92-7203

LABOR UNION OF PICO KOREA, LTD.; JUM-SOON YOO, President of Labor Union of Pico Korea, Ltd.; and SUNG RYE HONG, General Secretary of Labor Union of Pico Korea, Ltd.,

Plaintiffs-Appelants
Cross-Appellees,

—v—

PICO PRODUCTS, INC. and BERNARD HITCHCOCK, individually and in his capacity as Chairman of the Board of Directors, Director, and Chief Executive Officer of Pico Products, Inc.,

Defendants-Appellees,

PICO PRODUCTS, INCORPORATED,

Defendant-Appellee
Cross-Appellant.

Before:

CARDAMONE, WINTER and MAHONEY,
Circuit Judges.

Appeal and cross-appeal from the December 23, 1991 judgment of the United States District Court for the Northern District of New York (McAvoy, J.) in favor of defendant on plaintiffs' claim that parent corporation should be held liable as the alter ego of a subsidiary corporation, entered after a bench trial.

Affirmed.

FRANK E. DEALE, Center for Constitutional Rights, New York, New York (Ralph Shapiro, New York, New York, of counsel), *for Plaintiffs-Appellants-Cross-Appellees.*

GERALD J. MATHEWS, Syracuse, New York (William F. Baker, Menter, Rudin & Trivelpiece, P.C., Syracuse, New York, of counsel), *for Defendant-Appellee-Cross-Appellant.*

CARDAMONE, Circuit Judge:

This appeal questions the territorial scope of § 301 of the Labor Management Relations Act which provides that suits for violations of labor contracts may be brought in federal court without regard to the citizenship of the parties if the employees work in an industry affecting commerce between a foreign country and a state. A rigid and literal reading of this provision might permit the instant action to lie. But since the extraterritorial application of our laws is not favored because such may readily lead to

inadvertent clashes with the laws of other nations, we cannot presume Congress intended a Korean labor contract to come within § 301's compass.

Plaintiffs, citizens and domiciliaries of South Korea, are former employees of Pico Korea, Ltd. (Korea), a South Korean corporation with its principal place of business in Seoul. The labor union that served as plaintiffs' bargaining representative is a duly formed trade union under the laws of South Korea. Korea's American connection is that it was a wholly-owned subsidiary of Pico Macom, Inc. (Macom), a Delaware corporation with its principal place of business in California. Macom is, in turn, a wholly-owned subsidiary of defendant Pico Products, Inc., a New York corporation with its principal place of business in New York. Viewing this vertical corporate structure from the other direction, Pico Products owns Macom, which in turn owned Korea.

The facts are not in dispute. Korea was incorporated in 1985 to manufacture electronic components, all of which its parent Macom purchased except for a small amount sold to other customers at Macom's direction. In April 1988 Korea experienced cash shortages, and the parent company had to advance working capital. In June 1988 the companies' workers formed a labor union. A collective bargaining agreement was signed on November 15, 1988 with their employer. James D. O'Connell signed the agreement on Korea's behalf as president. From 1986 through February 1989 O'Connell served as the executive vice-president and director of Pico Products and as a member of the Board of Directors of Macom. He was the only person serving as a director of all three corporations.

Because Korea's problems—increasing labor costs, low productivity and lock of operating capital—had an

adverse impact on both Macom and Pico Products, a meeting of Pico Products' Board of Directors was held on February 23, 1989 to discuss these developments. The meeting resulted in a resolution directing Macom immediately to cease providing additional working capital to Korea. The effect of this action, not unanticipated, was that Korea went out of business.

Plaintiffs instituted the present action in the Northern District of New York (McAvoy, J.) asserting, *inter alia*, claims for breach of contract or, alternatively, tortious interference with advantageous contractual relationships. The essence of plaintiffs' complaint is that the shutdown of Korea did not conform to the provisions of the labor agreement. Plaintiffs predicated jurisdiction under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. The district court held federal question jurisdiction was lacking because § 301 was "passed . . . with respect to United States workers, not workers in a foreign country." Nonetheless, the action proceeded based on diversity of citizenship. The parties stipulated that New York (as opposed to South Korean) law applied.

After a bench trial, Judge McAvoy concluded that although "Pico Korea lacked autonomy over all but the most basic daily operations," piercing the corporate veil to hold Pico Products liable under the terms of the labor contract was not warranted because "there [was] insufficient proof to conclude that this control was within the hands of the defendant." The district court held plaintiffs had failed-as was required to hold Pico Products liable-"to pierce two corporate veils, not one." With respect to plaintiffs' tortious interference claim, the district court believed that though there was a valid and binding contract between plaintiffs and Korea-of which defendant was aware and the breach of which defendant

induced—liability could not attach because "Pico Products' action in inducing the breach of the contract was not malicious, but rather was motivated by justifiable concerns."

Plaintiffs insist on appeal that federal law—under which they believe it is generally easier to pierce a corporate veil—should have been applied to determine the propriety of holding Pico Products liable as Korea's *alter ego*. We disagree and affirm the judgment in favor of defendant Pico Products on plaintiffs' state law claims substantially for the reasons stated by Judge McAvoy in his thorough opinion of December 21, 1991. Hence the merits of defendant's cross-appeal need not be reached. We write in this case because the issue of § 301's territorial scope presents a novel question.

DISCUSSION

As in all matters of statutory construction, we start with the statute itself. Section 301 provides in pertinent part that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Federal courts have undertaken under this statute to develop a federal common law for the interpretation and enforcement of collective bargaining agreements, thus "requiring issues raised in suits *of a kind covered by § 301* to be decided according to the precepts of

federal labor policy." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (emphasis added). The question presented is whether Congress planned that the sort of labor contract at issue was to be "covered by" § 301.

Congress is presumed, as one might expect, to be concerned with domestic conditions first, and for that reason laws generally apply only in those geographical areas or territories subject to the legislative control of the United States, absent Congress' clearly expressed affirmative aim to the contrary. *See Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Plaintiffs carry the burden of demonstrating a Congressional purpose to overcome the presumption against extraterritorial application. *See EEOC v. Arabian American Oil Co.*, 111 5. Ct. 1227, 1231 (1991) (superseded by Pub. L. No. 102-166 (1991)). They attempt to meet this burden in two ways.

The first derives from the statute's language "without regard to the citizenship of the parties." According to plaintiffs, the plain meaning of this language is clear—§ 301 and federal law govern the resolution of this suit irrespective of the fact that plaintiffs are citizens of South Korea. This argument is misplaced because the issue is not plaintiffs' citizenship, but rather whether the labor agreement at issue is of the type Congress planned on having § 301 control. Merely because § 301 grants federal jurisdiction without regard to the citizenship of the parties does not mean federal jurisdiction exists without consideration of the nature of the collective bargaining agreement at issue. The phrase "without regard to the citizenship of the parties" simply establishes federal question jurisdiction, *see International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S.

237, 241-42 (1952), and does not overcome the broad presumption against extraterritorial application of federal law. In other words, when it is triggered § 301 provides federal question jurisdiction. The question before us is the threshold one: was § 301 triggered in this case.

Determining whether § 301 has application brings us to plaintiffs' second attempt to overcome the presumption in favor of territorial limitation. It is their contention that the only limitation on § 301 's applicability is that the industry in which employees covered by the collective bargaining agreement work must be one "affecting commerce." And, plaintiffs continue, the term "commerce" is defined for purposes of § 301 to include trade "between any foreign country and any State." 29 U.S.C. § 152(6). *See id.* § 142(1), (3). We assume the activities of Pico Korea, though the issue was not addressed by the district court, affect commerce within the meaning of § 301. According to plaintiffs, this conclusion should end the inquiry, for the statute's language is clear and must control.

We agree that Congress has authority under the commerce clause to make the instant labor contract subject to § 301. *See Arabian American*, 111 5. Ct. at 1230. Yet, it remains to be decided whether when Congress enacted § 301 it meant to exercise the full limits of its power. *Id.* In the present instance Supreme Court precedent suggests otherwise. The Supreme Court has held that the Eight Hour Law—requiring that contracts to which the United States is a party compensate laborers at time and a half for work in excess of eight hours, *see* 37 Stat. 137,54 Stat. 884, 40 U.S.C. §§ 324, 325a, *repealed by* Pub. L. No. 87-581, 76 Stat. 360 (1962), 40 U.S.C. §§ 328-30—does not apply to contracts performed in foreign countries. *See Foley Bros.*, 336 U.S. at 284-85. That law, like § 301,

made no distinction between alien and citizen labor. The Court took this to indicate that the statute was intended to apply only where the labor conditions of both citizen and alien employees are a probable concern of Congress. "Such places do not include foreign countries." *Id.* at 286. The Court specifically rejected the assertion that because the statute said "every contract" it encompassed the contract at issue, holding that the presumption against extraterritorial application had not been overcome. *See id.* at 287 & n.3 (quoting *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

Similarly, *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), held that the LMRA did not govern a dispute stemming from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily in an American port. Although Congress could have decided to regulate the matter in light of the fact that the vessel was in the territorial waters of the United States, the Supreme Court ruled that the Congressional scheme did not contemplate such a sweep because the LMRA "is concerned with industrial strife between American employers and employees." *See id.* at 142-44.

In the case at bar, the employees of Pico Korea are citizens and domiciliaries of South Korea, doing work in South Korea, for a South Korean company. The fact that Pico Korea is a wholly-owned subsidiary of a United States corporation does not change the character of this labor dispute into one over which Congress can be presumed to have intended § 301 to control. *Compare McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (NLRA), does not govern competing unions' claims to represent alien crews of ships

owned by foreign subsidiaries of United States' corporation that make regular trips between American and foreign ports transporting parent's products), *with International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970) (NLRA applies to dispute over picketing to protest wages paid by foreign vessels to American sailors working in American ports).

Nor does the fact that the work performed by Pico Korea's employees may "affect commerce" within the meaning of § 301 suffice to demonstrate a contrary congressional aim. *See Arabian American*, 111 S.Ct. at 1231-32 ("boilerplate language" concerning reach of statute enacted under Congress' power to regulate commerce does not overcome presumption against extraterritoriality). *See also Juneau Spruce*, 342 U.S. at 242 (though § 301 enacted partially to limit obstacles to suit in federal court, jurisdiction nonetheless may be limited by territorial considerations).

In the present "global economy" ever-expanding trade makes it increasingly possible that foreign industry might affect commerce "between [a] foreign country and any State." But to construe § 301 as governing collective bargaining agreements in such an industry "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice." *McCulloch*, 372 U.S. at 19. That the dispute in this case does not focus on the interpretation, *per se*, of the labor contract is not relevant. For were we to accept jurisdiction under § 301 merely for the purpose of deciding whether Pico Products is liable for the agreement's breach under federal labor law, it would lead to federal courts being called upon to determine if agreements such as this were in fact breached. Such a result would conflict with" '[t]he general and almost universal rule . . . that the character of an act as lawful or

unlawful must be determined wholly by the law of the country where the act is done.' "*New York Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925) (Federal Employers' Liability Act does not govern in damages action brought on behalf of United States citizen employed by United States railroad injured in Canada) (quoting *American Banana*, 213 U.S. at 356).

If Congress wants federal courts to enforce collective bargaining agreements between foreign workers and foreign corporations doing work in foreign countries according to the body of labor law developed pursuant to § 301, such legislative purpose must be made unmistakably clear. The statute evinces no such purpose. *Compare Steele v. Bulova Watch Co.*, 344 U.S. 280, 284-86 (1952) (Lanham Act, defining "commerce" as "all commerce which may lawfully be regulated by Congress," 15 U.S.C. § 1127, governs suit by United States corporation seeking damages for acts of trademark infringement and unfair competition done in a foreign country by a citizen and resident of the United States). The subject collective bargaining agreement therefore is not governed by § 301.

Hence, whether Pico Products is liable as Pico Korea's *alter ego* is not to be determined according to the precepts of federal labor law. From this it follows that plaintiffs' suit for tortious interference with the labor agreement also is not governed by federal law.

CONCLUSION

The judgment appealed from accordingly is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LABOR UNION OF PICO KOREA, LTD.;
JUM-SOON YOO, President of Labor
Union of Pico Korea, Ltd.; and
SUN RYE HONG, General Secretary of
Labor Union of Pico Korea, Ltd., 90-CV-774

Plaintiffs,

-against-

PICO PRODUCTS, INC.,

Defendant.

MEMORANDUM DECISION

The matter of Labor Union of Pico Korea, Ltd., et al. v. Pico Products, Inc., et al., 90-CV-774 was tried before this court without a jury from October 28, 1991 through November 4, 1991. At trial it was stipulated between the parties that the trial would be bifurcated, trying the issue of liability first and then, should it be required, trying the issue of damages at a later date to be determined by the court. This Memorandum Decision constitutes the court's findings of fact and conclusions of law as to liability pursuant to Federal Rule of Civil Procedure 52(a).

I.

FACTS

The defendant, Pico Products, Inc. ("Pico Products") is a New York Corporation which had, at the commencement of this action, its principal place of business in Liverpool, New York. Pico Products is a parent corporation to various first and second tier subsidiaries. Pico Macom, Inc. ("Pico Macom"), a wholly owned subsidiary of Pico Products (a first tier subsidiary), is a Delaware corporation with its principal place of business in Lakeview Terrace, California. Pico Korea, Ltd. ("Pico Korea") is a South Korean corporation with its principal place of business in Seoul, Republic of Korea and is a wholly owned subsidiary of Pico Macom.

Pico Korea was originally incorporated in March 1985 by another Pico Products first tier subsidiary, Pico St. Vincent, with an initial capitalization of $300,000 U.S. dollars. In 1986, following Pico Korea's incorporation, the stock of Pico Korea was transferred from Pico St. Vincent to Pico Macom, thus making Pico Korea a wholly owned subsidiary of Pico Macom and a second tier subsidiary of Pico Products.

From Pico Korea's incorporation and through late February 1989, James O'Connell ("O'Connell") was the president of Pico Korea. From February 1986 until February 1989, O'Connell was also the executive vice president and director of Pico Products and a member of the board of directors of Pico Macom.

Pico Korea was initially incorporated to manufacture electronic components for the cable TV industry that were sold

by Pico Macom. Pico Macom acted as the sole customer of Pico Korea, purchasing all of the former's products (except for a small amount which was sold directly to other purchasers at Pico Macom's direction).

During its first two years of operation, Pico Korea was marginally profitable in that sales exceeded costs of production, overhead, and payroll. In April, 1988, however, Pico Korea began to run short of operating capital and Pico Macom began to advance to Pico Korea additional capital to assist Pico Korea in meeting its obligations. These amounts, which were conveyed to Pico Macom in the form of a billed surcharge, were submitted at the end of each month by Pico Korea. The amount of the surcharge reflected the losses sustained by Pico Korea in the previous month. The parties referred to this procedure as "deficit funding."

In June of 1988, the workers at Pico Korea's plant in Boochun City began the process of forming a labor union pursuant to the laws of the Republic of Korea. Following the formation of the plaintiff labor union, negotiations were entered into between the union and Pico Korea for the purpose of entering into a collective bargaining agreement ("CBA"). On or about November 15, 1988, the CBA was signed by representative of the plaintiff labor union and by O'Connell on behalf of Pico Korea. This labor agreement contained various clauses, including the following which are relevant to the outcome of the instant litigation: [1]

---

[1] The quoted provisions are the result of stipulation between the parties. This stipulation represents the English translation arrived at by the parties' interpretation of the original contract which is in Korean. The literal nature of this translation and

Article 26 Payment of the Wages

1. The Company shall pay the union members on the fifth day of the next month the wage for the works done from the first day to the last day of each month. If the pay day falls on a holiday, then the wages shall be paid on the day immediately preceding business day.

2. The following may be deducted from the wages:

   A. Tax withholding and insurance premium deductions required by the law.

   B. The union dues and additional fees requested by the union.

   C. The fees by agreement between the union and the company.

Article 32 Payment for Suspension

The company shall pay 60% of the average wage in case of suspension of the company's operation lasting two or more days due to the following reasons, but the company shall have an agreement in advance with the union concerning the suspension of the company's operation and full wages shall be paid in case of suspension lasting less than two days.

---

interpretation accounts for the seemingly obvious grammatical errors.

1. suspension of operation due to electrical power blackout and/or water shutoff.
2. suspension of operation due to raw material shortage and repair and/or inspection of the machines.
3. suspension of any operation due to reason for which the company should be responsible.

Article 34 Severance Pay

The company shall pay the severance payment to the union members who have been continuously employed one year or more if such union member resigns, is dismissed or dies, and calculation of such severance payment shall be counted from the beginning of the employment and on the basis of average wages. (Wages, compensation, and all other valuables shall be paid not later than 14 days after the cause for the payment has arisen.) (Provided: that the payments hereunder shall be in average wages which includes added bonuses, winter special bonuses, monthly/annual allowances, meal allowances, and all other valuables.)

Article 38 Obligation of Notification and Raising Objections

In the event the company makes a decision regarding personnel matters, it must give an immediate written notification to the affected union members and the union mentioning the reasons therefore. The affected union members and union may submit a letter of objection within seven days from the date of receipt notification. And in the event an objection is raised, the company shall reconsider the decision in

a meeting attended by the affected union members and a union representative, and must give a written notification stating the result of the meeting within five days.

Article 39 Reduction of Personnel

The company may reduce the personnel for unavoidable reasons in management or down-scaling of operations by obtaining a 30 day prior consent from the union and pursuant to the following provisions:

1. The company, when reducing the personnel, shall call together the workers who will voluntarily retire under the condition that payments of additional retirement allowances be made in the amount of ordinary wages for a period of 30 days or more.

2. In the event that the number of the workers voluntarily retiring under subclause (1) is less than the number of personnel reduction agreed upon by the company and the union, the personnel reduction shall proceed on the basis of absentee rate, punctuality, and duration of employment.

3. In the event the company wishes to relocate, the company shall give a three month prior notice to the union of its relocation plan and shall agree on the details of the plan through negotiations with the union.

4 The company shall engage in advance negotiations with the union when implementing decisions such as contracting out the works which results in de facto reduction of personnel.

Article 69 Notification

The company shall notify the following matters whether in written form or orally at the meeting:

1. Long term management plan, annual management policy, quarterly production plan and outcome, personnel plans;
2. Personnel reduction, regular hiring and significant relocation of personnel;
3. Factory closing, suspension of operation, merger and subdivision, scale down and expansion of operation; and
4. Other matters subject to notification requirement as agreed to by the union and the company at prior meeting.

In December of 1988, O'Connell informed Pico Products and Pico Macom that he had entered in the CBA. The collective bargaining agreement was to expire on November 14, 1989 and was duly in effect at the time that Pico Korea ceased to exist as an operating business in February of 1989.

During the period of April 1988 through late January 1989, the percentage of defective products per shipment from Pico Korea began to escalate. By the end of January 1989, Pico

Macom had received approximately 450,000 units of electronic components that were defective. Such products were either sent back to Korea for correction or were sold for salvage value. Both avenues represented losses for Pico Macom.

From September 1988 to January 1989, the cost of labor as a percentage of the cost of manufactured goods rose dramatically. The defendant claimed that this percentage rose from 26.9% to 74%.

In addition, the union informed the Korean management that they would be requesting a further wage increase in March of 1989.

On February 23, 1989, a special meeting of the board of directors of Pico Products was convened at the home of Pico Products' Chairman of the Board Bernard Hitchcock. The purpose of the meeting was to discuss the financial problems which Pico Korea was experiencing and their effect on Pico Products. This meeting resulted in a resolution which directed Pico Macom to immediately cease providing the additional working capital to Pico Korea.

The following day, Hitchcock informed O'Connell of the same resolution. The defendant admits that O'Connell was adamant in his decision to return to Korea in an attempt to salvage Pico Korea. Hitchcock informed O'Connell that if he returned to Korea, Hitchcock would remove all of his powers to enter into transactions on behalf of Pico Korea. The evidence did not reveal from where Hitchcock implied such power arose.

In defense of Hitchcock's threat, the defendant claimed that Hitchcock acted from two concerns. The first was a concern for O'Connell's safety which arose because of a history

of hostage-taking in Korea labor actions. It should be noted that such an explanation, while seemingly incredible, was eventually confirmed when it was shown that the Pico Korea workers briefly took and held hostages following the closure of the Korean corporation.

As a second reason, the defendant claimed that O'Connell had made two unauthorized personal loans to Pico Korea, the second after he had been warned against such action. At trial, Pico Products' board of directors George Knapp and John Sills implied that such a practice shed doubt on O'Connell's ability to fulfill his fiduciary duties.

Following the dismissal of O'Connell, Hitchcock contacted the South Korean law firm of Shin & Kim and requested that they act as Pico Products' agents in Korea in regard to the closing of Pico Korea. However, on March 6, 1989, Hitchcock received a fax letter from the law firm of Shin & Kim informing him that the firm was withdrawing from representation due to physical threats of life and limb made by various Pico Korea labor union members.

On March 6, 1989, Hitchcock faxed a message to the plaintiff labor union indicating that Mr. Yong Gu Kim, manager of Pico Korea, was terminated as an employee and agent of Pico Korea. This action, the defendant claims, was also done to protect the safety of Mr. Yong.

The employees of Pico Korea were not paid for wages earned for work performed during the month of February, 1989. In addition, these employees were not provided with notice of the shutdown or paid suspension or severance pay. Following the shutdown, the members of the plaintiff labor union took control of the Boochun City plant and attempted to continue

production with the remaining available resources. The plaintiff Sun Rye Hong admitted that the seizure of the plant continued for approximately two months. During this time, union members sent fax telegrams to Hitchcock demanding negotiations on the back pay and contract terms.

Eventually, the plaintiffs sought to remedy the purported breaches of the CBA under the provisions of American law and they have proceeded against the defendant corporation on a number of legal theories. After previous motions were decided by this court, two causes of action remain. This first, a breach of contract theory attempts to hold the parent corporation, Pico Products, liable for its second tier subsidiary's obligations arising under the CBA The second alleges a cause of action for the tortious interference with the CBA. The parties have stipulated that New York's choice of law rules mandate that New York law controls the remaining causes of action.

II.

II. DISCUSSION

A. Breach of Contract

Plaintiffs' breach of contract theory attempts to "pierce the corporate veil" and hold the New York defendant liable for breach of the CBA as if it were a party to the agreement. The plaintiffs allege that the parent corporation, Pico Products, so dominated the operations of the Korean subsidiary that the Korean corporation was but a puppet of the New York corporation. The control, the plaintiffs allege, came both in the form of overt decision making at the New York corporation as well as in more disjointed forms. As to the latter, the plaintiffs

claim that the defendant controlled the fate of the Korean subsidiary by controlling the flow of essential working capital being advanced from Pico Product's first tier subsidiary, Pico Macom. When it became apparent that the recently entered CBA was infringing upon the parent's otherwise available profits, the plaintiffs claim, the defendant used its control to close the Korean subsidiary and to prevent the subsidiary from honoring the terms of the CBA.

In as much as Defendant Pico Products is not a signatory to the CBA, the plaintiffs now attempt to impose liability via a "piercing of the corporate veil/alter ego" theory. In opposition, the defendants argue that there was not sufficient control to impose liability upon a parent corporation for the acts of a subsidiary.

(i) Corporate Separateness

A corporation is entitled to a presumption that it is an entity which is separate from its sister corporations, subsidiaries, and shareholders. Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215,61 S.Ct. 904 (1941); American Renaissance Lines Inc. v. Saxis Steamship Co., 502 F.2d 674 (2d Cir. 1974). Thus, as a general rule a parent corporation is not liable for the acts of a subsidiary. Dempsey v. Intercontinental Hotel Corp., 126A.D.2d 477, 511 N.Y.S.2d 10 (1st Dept. 1987) citing Port Chester Electrical Construction Corp. v. Atlas, 40 N.Y.2d 652, 389 N.Y.S.2d 327 (1976). However, a court may disregard the separate legal identity of the parent and subsidiary corporation if it is shown that the parent has ignored the subsidiary's wall of separate corporate identity. Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 163,432 N.Y.S.2d 879, 885, 886 (1980). If it is shown that a parent corporation used a subsidiary as a "department" rather than treating it as an independent concern,

New York law allows the parent corporation to be held accountable for the contracts of its subsidiary. Tesoro Petroleum Corp. v. Holborn Oil Co., 500 N.Y.S.2d 118 (1st Dept. 1986); see also, Gulf & Western Corp. v. New York Times Co., 81 A.D.2d 772, 439 N.Y.S. 2d 13 (1st Dept. 1981) (holding that parent will not be liable unless it is shown that it exercised complete control over its subsidiary).

(ii) Piercing the Corporate Veil

"In order to overcome the presumption of separateness, what must be shown is that the parent is the 'alter ego' of the subsidiary and that the subsidiary is the 'mere instrumentality' of the parent." Fidenas AG v. Honeywell Inc., 501 F. Supp. 1029, 1036 (S.D.N.Y. 1980) (applying New York law). Under this "alter ego/ mere instrumentality" approach to piercing the corporate veil, New York law requires that the plaintiffs plead and prove:

1. Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

2. Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiffs legal rights; and

3. The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Gorrill v. Icelandair/Flugleidir, 761 F.2d 847,853 (2d Cir. 1985) (emphasis in original) citing Lowendahl v. Baltimore & Ohio Railroad Co., 247 A.D.144, 157, 287 N.Y.S. 62, 76, aff'd 272 N.Y. 360 (1936).

The plaintiffs in the instant action claim that the parent corporation, Pico Products, controlled the operations of the Korean subsidiary via interlocking directorates and officers, a major stockholding, and financial control of the Korean corporation to such a degree as to render the Korean concern nothing more than a "plant" operating at the desire and direction of the New York parent. Further, the plaintiffs claim that the control exerted by the parent was used to close the Korean concern without notice or negotiations, thus breaching the collective bargaining agreement. As such, the plaintiffs allege that they were injured and that their injuries stemmed from Pico Products' actions.

Nevertheless, the term "complete domination and control" is malleable at best and open to differing interpretation. In an attempt to more clearly define its parameters, the New York Court of Appeals has stated:

> [L]iability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of the subsidiary. At the very least there must be direct intervention by the parent in the management of the subsidiary to such an extent that "the subsidiary's

paraphernalia of incorporation, directors, and officers" are completely ignored.

Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 163, 432 N.Y.S.2d 879, 886, (1980) citing Lowendahl, 247 App.Div at 155, 287 N.Y.S. 62.

Other courts have offered lists of factors which may be used to determine "complete domination." These factors include:

a. Whether the parent corporation owns all or most of the subsidiary;

b. Whether the parent and subsidiary have common directors or officers;

c. Whether the parent corporation finances the subsidiary;

d. Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;

e. Whether the subsidiary has grossly inadequate capital;

f. Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary;

g. Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;

h. Whether in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;

i. Whether the parent corporation uses the property of the subsidiary as its own;

j. Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest;

k. Whether the formal legal requirements of the subsidiary are not observed.

Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F. Supp. 64, 67-68 (S.D.N.Y. 1968) (citing Powell, Parent and Subsidiary Corporation §§ 5, 6); See also, Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167 (S.D.N.Y. 1985).

(iii) Proof at Trial

The proof at trial revealed that Pico Korea lacked autonomy over all but the most basic daily operations. On a wide-scale operational level, Pico Korea was clearly controlled by others. However, this court must conclude that there is insufficient proof to conclude that this control was within the hands of the defendant Pico Products.

At trial it was proved that Pico Macom controlled the monthly influx of capital into the Korean corporation. Pico

Products was not made aware of this "deficit funding" until well after the practice had been established. Thus, it was Pico Macom who must be said to have "financed" the corporation. Such a decision by Pico Macom to provide the deficit funding was only logical as it was Pico Macom, not Pico Products, that was the sole buyer of the Korean corporation's products. Further, the stock of the Korean corporation was wholly owned by Pico Macom, no,t Pico Products. Thus, it must be concluded that Pico Products financial control of the Korean corporation was de minimis at best.

Although there is evidence that the Korean corporation controlled many of its own daily operations (the corporation was incorporated under the laws of Korea; it had its own bank accounts, tax returns, and auditors; it controlled the hiring and firing of the non-management work force; and it took loans in its own name), the overwhelming impact of the evidence is that on an operational level the corporation was controlled by others. Indeed, the president of Pico Korea, James O'Connell, lacked autonomy and took his orders from individuals who sat on the boards of both Pico Macom and Pico Products. Nevertheless, the plaintiffs have not met their burden of proving that it was the corporation of Pico Products and not Pico Macom from where these directors gained their authority to control O'Connell.

While it is true that O'Connell and the manager of operations, Yong Gu Kim, were hired by Bernard Hitchcock, Mr. Hitchcock sat on the boards of both Pico Products and Pico Macom. Without proof that Hitchcock was acting on behalf of Pico Products when he took this action, the element of control by the defendant is lost. In the same vein, the claim by the plaintiffs that there existed interlocking directorates between the parent corporation and its various subsidiaries is of little value.

Here, there existed only one interlocking director between the Korean corporation plaintiff and defendant — James O'Connell. This hardly arises to the level of being so intertwined that the paraphernalia of the subsidiary is disregarded.

While it is also true that the parent corporation's annual report and 10-K Statement referred to the Korean corporation as "belonging" to it, the court may view this as only one factor in its determination. That the New York corporation took responsibility for "winding up" the Korean corporation after its closure and retained Korean legal counsel for this purpose indicates nothing more then that the defendant sought to protect its economic interest. These factors "seem to represent fairly common relationships between the parent corporation and subsidiaries rather than the 'alter ego' or 'mere instrumentality' relationship required for piercing the corporate veil." Fidenas AG. v. Honeywell. Inc., 501 F.Supp. at 1037 (citing Berkeley v. Third Avenue Railway Co., 244 N.Y. 84, 155 N.E. 58 (1920)).

(iv) Conclusion

Thus, the facts of the case do not reveal that the first element of the Lowendahl test is satisfied as to defendant Pico Products. The stark reality of the situation at hand is that the defendant has insulated itself from liability via the very corporate structure the plaintiff now wishes to destroy. However, it is well recognized that the primary purpose of forming a corporation is to enable shareholders to avoid personal liability. See Rapid Transit Subway Const. Co. v. City of New York, 259 N.Y. 472, 487-88, 182 N.E. 145 (1932). The laws of New York condone the use of the corporate entity to avoid personal liability. "With few exceptions, New York courts continue to treat the corporate veil as 'nearly impregnable' and to adhere to the general rule that courts will not 'pierce the

corporate veil' or disregard the corporate entity by imposing personal liability on shareholders or on a parent or affiliated corporations." Harrington, Business Associations. 1988 survey of New York Law, 40 Syracuse Law Rev. 21, 54 (1989).

As the defendant has correctly stated, to prevail on their contract theory, the plaintiffs must pierce two corporate veils, not one. The layering of separate corporate entities, whereby Pico Products is insulated by the corporate walls of both Pico Korea and Pico Macom, serves effectively to protect the parent. Thus, the defendant, as stockholder or as parent corporation is not liable for the subsidiary's breach of contract. Whether another entity has dominated or controlled Pico Korea is beyond the scope of the plaintiffs' action and is therefore not addressed by this court.

B. Tortious Interference with Contract

The theory underlying the plaintiffs' tortious interference cause of action is that the defendant Pico Products took deliberate action calculated to close Pico Korea thereby preventing Pico Korea from complying with the terms of the collective bargaining agreement. Among the plaintiffs' contentions are allegations that anti.union animus on the part of the directors of Pico Products so fueled their decisions that they took this deliberate despite knowledge that a CBA existed. The plaintiffs contend that this action, namely, a directive to Pico Macom to cease funding to Pico Korea, was done with the intent of swiftly shutting down the Korean subsidiary and thereby preventing the officers of the Korean corporation from honoring the obligations arising under the CBA The defendant claims, however, that it acted within the confines of the applicable law and that the actions were justifiable.

(i) Elements

To make out a cause of action for tortious interference under New York law the plaintiff must show that (i) it had a valid and binding agreement with another party; (ii) the alleged interferer knew of the agreement yet acted intentionally to induce its breach; (iii) the agreement was consequently breached;[2] and (iv) damage resulted from the breach. Israel v. Wood Dolson Company, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 5 (1956); Click Model Management. Inc.. v Williams, 167 A.D.2d 279, 561 N.Y.S. 2d 781, 782 (1st Dept. 1990); Feeley v. Midas Properties. Inc., 154 A.D. Id 505, 546 N.Y.S. 2d 131 (2d Dept. 1989); Resource Dev. Inc v. Statue of Liberty - Ellis Island, 926 F.2d 134, 142 (Id Cir. 1991) (applying New York law); Don King Productions. Inc. v. Douglas, 742 F.Supp. 741, 771-72 (S.D.N.Y. 1990).

The court finds that a valid and binding contract existed between the plaintiff and Pico Korea; that the directors of Pico Products were aware of the contract existing between these two parties but took deliberate action, realizing full well the

---

[2] Some courts in New York have not required that the relevant contract be breached. Instead, those courts have required "intentional interference with performance of the contract by the third party without justification." 5 & 5 Hotel Ventures Limited Partnership v. 777 S.H. Corp., 108 A.D.Id 351, 489 N.Y.S. Id 478, 480 (1st Dept. 1985) (alleging interference with a sales contract); Stratford Materials Corp. v. Jones, 118 A.D.Id 559, 499 N.Y.S.Id 172, 173 (Id Dept. 1986). Nevertheless, because this court finds that the relevant contract has been breached, it need not address this line of reasoning.

consequences and impact of such action, and ordered the cessation of funding to Pico Korea thereby inducing (or, more appropriately, causing) the contract to be breached; that the contract was breached by the failure of Pico Korea to abide by the terms and conditions of articles 26, 32, 34, 38, 39, and 69; and that the plaintiffs have suffered damages as a result of the breach.

(ii) Felsen Privilege

Nevertheless, the legal inquiry may not end here. Throughout this case the defendant has argued a corporate privilege arising under New York law. See Felsen v. Sol Cafe Mfg. Corp., 24 N.Y.2d 682, 686, 301 N.Y.S.2d 610, 613 (1969). This privilege, referred to by this court as the "Felsen Privilege," insulates parent corporations' actions which cause their subsidiaries to breach contracts. Id. However, the New York courts have held that this privilege is not without limitations and applies only when the parent's actions are motivated by a justifiable business purpose (such as the protection of its economic interests). Id.; see also Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156, 554 N.Y.S.2d 867, 869 (1st Dept. 1990) (corporate parent has right to interfere with contract of subsidiary in order to protect its economic interests); American Protein Corp. v. AB Volvo, 844 F.2d 56, 63 (2nd Cir. 1988) (applying New York law). This privilege does not apply if it is shown that the parent's action is motivated primarily by malice or some other unjustifiable purpose. Felsen, 24 N.Y.2d at 686, 301 N.Y.S.2d at 613; Lloyd I. Isler, P.C. v. Sutter, 160 A.D.2d 609,554 N.Y.S.2d 253, 255 (1st Dept. 1990) (cause of action for tortious interference with contract not made out unless plaintiff raises triable issue of fact that defendants were motivated primarily by malice rather than economic interests); American Protein Corp., 844 F2d at 63.

The court first addressed this issue on defendant's motion for Summary judgment, finding primarily that the plaintiff's allegation of malice, cloaked in the dress of anti-union animus, raised a sufficient question of triable of fact to withstand summary judgment. As a secondary matter, this court interpreted the Felsen Privilege as applying to the motives of the directors of the corporation, not to the objective actions of the corporate entity itself.[3] The rationale behind this secondary

---

[3] This rationale took its emphasis from the Second Circuit opinion in American Protein Corp. v. AB Volvo, 844 F.2d 56 (2nd Cir. 1988). In American Protein the court stated:

> The law of New York provides an applicable rule when a possible conflict arises between a director's duty to honor corporate contractual obligations and simultaneously to protect shareholders' best interests. In such an event, directors of parent corporations are released from liability for the contract's dishonor when it results from an effort to protect stockholders, absent a malicious motive. Felsen v. Sol Cafe Mfg. Corp., 24 N.Y.2d 682, 686, 301 N.Y.S.2d 610, 249 N.E.2d 459 (1969). In Felsen the New York Court of Appeals... explained that the plaintiff could not recover unless it established that the defendant's actions were "motivated by malice towards the plaintiff rather than by the preservation of its own economic interests..." Id. at 686-87, 301 N.Y.S.2d 610, 249 N.E.2d 610, 249 N.E.2d 459. In adopting that proposition, the court continued, an individual with an economic stake in the business of another may interfere with a contract that the

reason was that because a corporation is little more than an entity given "life" through the fiction of legal reasoning, it is devoid of free will or rational decision making. Therefore it cannot, on its own, act either with or without a malicious state of mind. Rather, its "will" must be imposed upon it by its human controllers, or directors. Thus, in order to apply the privilege, which by its very terms necessitates an evaluation of the subjective mind-Set of the decision-makers(s), the court must evaluate the motives of the corporation's directors.

In support of its motion for summary judgment, the defendant merely claimed that Pico Products' actions were privileged because the corporation was losing profits due to losses by its second tier Korean subsidiary. However, in the context of the plaintiffs' allegations that the various directors were motivated by anti-union animus, such a claim by the defendant (without legally sufficient evidence depicting the directors' motives) was insufficient to withstand summary judgment. Nevertheless, a lack of such evidence is not the situation before this court now. Both parties have adequately addressed the issue of malice at trial. There has been extensive testimony from members of the board of directors of Pico Products to allow this court to determine whether Pico Products, through its board of directors, acted with malice in its decision to shut down the Korean corporation.

(iii) Proof at Trial

---

other business has with a third person if the purpose is to protect the individual's own stake.

844 F.21d at 56.

At trial, various directors of the defendant corporation were called to the stand. All testified that they were aware of the collective bargaining agreement between the plaintiffs and Pico Korea, yet each claimed a justifiable business reason for the decision that eventually closed the Korean concern. One director summed up the testimony of the others when he claimed that, from a financial perspective, the Korean corporation was "hemorrhaging." To have allowed the losses to continue, the directors claimed, would have jeopardized the entire Pico conglomerate.

The business and economic reports produced by the defendant supported their allegations. These clearly showed that Pico Korea ceased being profitable in April, 1988. Alter this time, its lifeline consisted solely of capital advances, referred to as "deficit funding," from Pico Macom. The purpose was to keep the Korean corporation solvent in the hope that it could regain its self-sufficiency in the future. Nevertheless, the directors of Pico Products claimed that in the face of raising labor costs, increasing labor unrest, and a drastic decrease in levels of both production and quality, Pico Korea labored simply to remain afloat.

The effect of the funding operation was ultimately felt by the parent corporation. Because the funding affected Pico Macom's profits, the parent as shareholder likewise was detrimentally affected. The directors claimed that in order to stop the losses and to save the entire company, drastic measures were warranted. Acknowledging that cessation of the deficit funding would quickly spell the demise of the Korean corporation, the directors of Pico Products passed a resolution which ordered Pico Macom to stop the funding. In addition, because of unrelated factors arising from purported personal loans made to the company without corporate approval, the

directors of Pico Products were forced to remove the chief officer of Pico Korea, James O'Connell. Shortly thereafter, the Korean manager of operations, Yong Ku Kim, was also terminated.

The after effect was that Pico Korea, without an individual to take control of management's helm, floundered momentarily and then sunk The contested terms of the collective bargaining agreement were never honored.

(iv) Malicious Intent

The plaintiffs contend that the very admission by the various directors that "labor costs and unrest" entered into the calculus leading to the decision to stop funding evidences a malicious intent. In post-trial briefs the plaintiffs have argued that although this anti-union animus may not be interpreted as malice within the meaning of the federal labor laws,[4] it may be so interpreted within the context of the Organization for Economic Cooperation and Development's (OCED) Guidelines for Multi-national Enterprises and Labor Relations.

In addressing the argument raised in plaintiffs' post-trial brief, the court notes that it is not inclined to accept evidence after the close of the case. As the plaintiffs correctly point out, the OCED Guidelines are not legally enforceable but serve merely as a "morally obligatory code of conduct." In this vein

---

[4] See Memorandum Opinion and Order, October 7, 1991, 90-CV-774 (McAvoy, D.J.,) (holding that plaintiff's argument under Abrams v. Allen, 297 N.Y. 52 (1947) would not be accepted because the case relied upon a body of law found by this court not to apply to the instant action.

these guidelines do not effect the court's decision. Further, the court notes that it does not need formal guidelines to determine what is or is not morally correct. Rather, that determination is made from legal precedent, from the experience of this court, and from the applicable facts as this court finds them to be.

Focusing once again on the Felsen Privilege, the court is faced with a difficult decision. It must determine whether the defendant's intentional interference with the collective bargaining agreement was primarily motivated by malice, or whether justifiable business reasons formed the primary impetus for such action. Black's Law Dictionary, Fifth Edition, defines malice as "[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent." The definition does little to advance the inquiry. The definition of malice and the Felsen Privilege are redundant. Both prohibit the doing of an otherwise wrongful act unless there is justifiable cause. The question then becomes, what is a justifiable cause?

In 1980 the New York State Court of Appeals, in the case of Guard-Life Corp. v. S. Parker Hardware Mfg., 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980), had the opportunity to examine the tort of intentional interference with a contract. While the central focus of the Guard-Life case involved the question of liability arising when the questioned contract was void or voidable, the court'S discussion of the state-of-mind element of the tort is applicable here. There, the New York court recognized that the tort of interference with contractual relations, as defined by the Restatment of Torts 2d, applied to one who improperly interferes with the performance of a contract. Guard-Life Corp., 428 N.Y.S.2d at 631. In recognizing the distinction in the use of the term "improper" as opposed to the phrase "without justification," the Court stated:

> The keystone of the statement is the adverb "improperly" — a term selected in preference to the phrase "without justification" appearing frequently in judicial decisions and giving rise to questions of burden of proof — the definition of which is inconstant and mutable, drawing its substance from the circumstances of the particular situation at hand.

Guard-Life Corp., 428 N.Y.S.2d at 631.

(v) Relevant Circumstances

Further drawing from the Restatement of Torts 2d, the Guard-Life court elaborated on which circumstances should be considered when determining whether, as must be done under Felsen, the interference was proper or improper. Included among the factors to be considered "are the nature of the conduct of the person who interferes (a chief factor in determining whether conduct is improper), the interest of the party being interfered with, the relationship between the parties, "the motives and interests sought to be advanced by the one who interferes, and the social interests involved. Guard-Life Corp., 428 N.Y.S.2d at 632 & 632n.2.

Here, the nature of the conduct of the interferer, Pico Products, was not in itself wrongful. Pico Products did not interfere by way of fraud, violence, misrepresentation, or unjustifiable civil or criminal legal actions — the more common forms of "wrongful" interference. See Guard-Life Corp., 428 N.Y.S.2d at 632. In the same vein, the professed motives and interests sought to be advanced by Pico Products were of the type historically recognized as proper. Felsen, 301 N.Y.S.2d at 686; Koret, Inc. v. Christian Dior, S.A, 554 N.Y.S.2d at 869;

American Protein Corp., 844 F.2d at 62-63. The protection of the economic interests of shareholders has, from the date of Felsen, been recognized as a proper motive within the State of New York. Further, the legal relationship of the parties here is of little consequence. Plaintiff and defendant had no legal relationship and thus Pico Products owed no affirmative duty to the plaintiff union.

And finally, the societal interests involved, while always favorable to the sanctity of contracts, weigh in favor of the defendant's actions. Indeed, this is the law as established by the New York Court of Appeals in Felsen, 301 N.Y.S.2d 610. In explaining the superiority of societal interests in the economic rights of shareholders, the Felsen court stated:

"Procuring the breach of a contract in the exercise of an equal or Superior right is acting with just cause or excuse, and it is justifiable for what would otherwise be an actionable wrong." (Knapp v. Penfield, 143 Misc. 132, 134-135, 256 N.Y.S. 41, 44.) Thus, Chock Full O'Nuts, as the sole stockholder of Sol Cafe, had an existing economic interest in the affairs of Sol Cafe which it was privileged to attempt to protect when it "interfered" with plaintiff's contract of employment with Sol Cafe.

301 N.Y.S.2d at 614.

(vi) Anti-union Animus

The plaintiffs' allegations of anti-union animus on the part of the defendant is of little moment to this court's ultimate conclusion. While the defendant's directors have openly admitted that a primary factor in their decision was the rising labor costs at Pico Korea, such concerns, in this context, do not evidence a malicious character. Workers in the international

market, those beyond the reaches of our Constitution and the Commerce Clause which provides the basis for our national labor laws, are not afforded protection from actions which may be detrimental to collective bargaining.[5] Without the protective classification provided American workers by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, Pico Products' admission that raising labor costs influenced their decision to interfere in the contract, even if a causal connection is found between the rising labor costs and union activity, is not malicious. Quite to the contrary, Pico Products' actions must be viewed as a purely economic based decision, the type of action expressly sanctioned by New York law. Felsen, 301 N.Y.S.2d at 614. Pico Products action was motivated by its desire to protect its economic interests, not out of disdain for unionism. As the New York courts have held, such a motivation is justifiable.

(vii) Conclusion

Consequently, this court finds that Pico Products' actions in inducing the breach of the contract was not malicious, but rather was motivated by justifiable concerns. Thus under the

---

[5] Despite the fact that Section 1 of the NLRA enunciates that "the policy of the United States" is to encourage collective bargaining, 29 U.S.C. §159, this policy applies only to workers within the United States. This conclusion is reached by virtue of the fact that the NLRA is founded upon principles of the Constitution's Commerce Clause. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 LEd. 893 (1937). Because the dictates of the Constitution apply only within the confines of our sovereignty, so too must policy considerations arising therefrom.

holding of Felsen and its progeny, no liability adheres to the defendant's action.

III.

CONCLUSION

For the reasons set out in this Memorandum Decision, this court finds that the plaintiffs have failed to present evidence sufficient to impose liability upon the defendant for either of the two remaining claims. Consequently, this court instructs the Clerk of the Court to enter judgment for the defendant on both the contract and tortious interference causes of action.

It is so ORDERED.

Dated Binghamton, New York

December 21, 1991

Thomas J. McAvoy

U.S.C.I.